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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

AT&T'S COMMENTS

Francine J. Berry
Steven R. Davis
Richard H. Rubin

295 North Maple Avenue
Basking Ridge, New Jersey 07920

Attorneys for American Telephone
and Telegraph Company

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SUMMARY

Congress' adoption of Section 309(j) authorizes the Commission to award spectrum licenses on the basis of competitive bidding. This NPRM was issued to establish the rules and procedures necessary to implement the Commission's new authority. AT&T believes that many of the Commission's tentative conclusions in the NPRM are sound. With a few modifications, the proposals in the NPRM should fulfill the statutory objectives to promote the rapid development and deployment of new services; promote economic opportunity and competition; recover a portion of the value of the spectrum for the public; and encourage efficient and intensive use of spectrum.

Although AT&T supports the ability of any bidder to obtain all of the individual licenses it needs to provide a nationwide service, the NPRM's proposal to permit such bidding for Blocks A and B of the PCS spectrum is inconsistent with the statute's objectives and is also administratively inefficient. The NPRM's combinatorial bidding proposal could inhibit the rapid development of the spectrum, particularly in rural areas; reduce competition and the likelihood there will be a diverse base of license holders; increase the possibility of delay in awarding licenses; and reduce the potential market value of the PCS spectrum. In addition, it would unnecessarily complicate the competitive bidding process. Therefore, AT&T urges the

Commission not to adopt this tentative recommendation and to authorize only individual MTA license auctions. Such bidding will enable prospective nationwide operators to obtain all of the licenses they need and also satisfy all of the statutory objectives.

With respect to the Commission's proposals on the sequence of auctions, AT&T recommends that the Commission auction narrowband PCS licenses first, followed by a brief series of auctions for a variety of different broadband PCS licenses. This will allow the Commission to gain valuable experience in conducting auctions while affecting the smallest amount of spectrum. Given the significance of the competitive bidding process, such experience is essential before the Commission auctions the majority of the broadband PCS spectrum. A carefully designed roll-out, guided by actual experience, will allow the Commission to uncover any problems before it conducts the most important broadband auctions, and it will assure the development of a rapid and orderly process for licensing the use of such spectrum.

AT&T agrees with the Commission's conclusions that PCS meets all of the statutory criteria for competitive bidding and that oral bidding should be the primary auction method used for all spectrum auctions.

Except for the Commission's tentative conclusion regarding "intermediate links," AT&T agrees with the Commission's general principles for determining whether spectrum licenses should be awarded on the basis of

competitive bidding. In particular, AT&T demonstrates that the use of competitive bidding for point-to-point spectrum licenses and satellite licenses, whether or not they are used as "intermediate links," will create the potential for speculation and inefficiencies that do not serve the public interest.

The NPRM states that the Commission expects to implement a number of different types of preferences to assist designated entities' ability to participate in spectrum use. In order to avoid unnecessary disputes in the future, it is important for the Commission to establish clear definitions of the entities who may be eligible for such preferences. In addition, the Commission should adopt specific safeguards consistent with Section 309(j)(4)(E), to assure that preferences do not produce unjust enrichment and are used only to fulfill the statutory objectives.

AT&T concurs with the Commission's concern that only serious bidders who are willing and able to make productive use of the spectrum should be allowed to participate in the Commission's auctions. Thus, reasonable application and filing requirements, upfront payments and deposit rules are necessary, as well as appropriate procedural rules to assure that only qualified parties obtain licenses. AT&T also agrees that lump sum payment of license fees is appropriate for all licensees other than designated entities.

There are a number of other ways in which the Commission's proposed procedures could be enhanced. In particular, AT&T suggests that the Commission move immediately to set up electronic funds transfer mechanisms to make it easier for bidders to comply with its proposed payment and deposit requirements. AT&T also suggests that the Commission establish electronic filing capabilities to facilitate the application process.

In sum, the NPRM makes a substantial start in assuring that the competitive bidding process will be successful and achieve all of the statutory objectives. Adoption of the modifications recommended herein will improve the Commission's proposals even further.

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AT&T'S COMMENTS

Pursuant to the Commission's Notice of Proposed Rulemaking released October 12, 1993 ("NPRM"), American Telephone and Telegraph Company ("AT&T") hereby comments on the Commission's proposals for the implementation of Section 309(j) of the Communications Act.

INTRODUCTION

Section 309(j) authorizes the Commission, for the first time, to award licenses or construction permits for certain uses of the electromagnetic spectrum on the basis of competitive bidding.¹ In the NPRM, the Commission describes its tentative proposals for the competitive bidding process, and it requests comment on a wide range of related issues.

¹ Section 309(j)(2) was added to the Communications Act in August, 1993 as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), P.L. 103-66, Tit. VI, § 6002(a).

Specifically, the Commission seeks comment on its proposals to authorize "combinatorial" bidding for the 30 MHz frequency blocks for Personal Communications Services ("PCS"), on the order and manner in which spectrum auctions should be conducted, and on appropriate preferences for the entities designated in the new statute. The Commission also seeks comment on the safeguards that will be necessary to assure that any preferences are not abused; on the requirements that should be imposed upon bidders; and on its tentative decisions regarding the applicability of competitive bidding to specific services. AT&T comments on each of these matters in turn below.

ARGUMENT

As AT&T demonstrates in Section I below, the combinatorial bidding proposed for PCS licenses will not serve the objectives of the statute. Moreover, as shown in Section II, the other bidding procedures recommended by the Commission will permit the efficient aggregation of spectrum licenses, the principal stated benefit of the combinatorial bidding format. Therefore, the Commission should limit competitive bidding on PCS spectrum Blocks A and B to individual auctions for MTA licenses.

In Section II below, AT&T supports the Commission's basic premise that competitive bidding is an efficient way to issue spectrum licenses, because the parties who value a license most will be the most likely to

make productive use of the spectrum. AT&T also shows that a carefully designed roll-out of competitive bidding, beginning with narrowband PCS auctions, will maximize the effectiveness of the entire competitive bidding process. AT&T further supports the Commission's determinations that PCS spectrum licenses may be issued on the basis of competitive bidding and that oral ascending bidding should be the principal auction method.

In Section III, AT&T concurs in the Commission's interpretation of the statutory criteria for determining whether competitive bidding is permissible under the statute. AT&T opposes, however, the Commission's tentative conclusion that mutually exclusive applications for use of spectrum to provide "intermediate links" should generally be awarded on the basis of competitive bidding. In particular, AT&T demonstrates that competitive bidding should not be applied to point-to-point microwave and satellite services.

In Section V, AT&T recommends that the Commission adopt clear definitions specifying the entities entitled to receive preferences. AT&T also responds to the Commission's request to propose specific safeguards that will discourage abuse of such preferences.

Section VI supports many of the Commission's specific proposals for application requirements, payments, and procedural rules and suggests a number of enhancements that will improve the competitive bidding process.

I. THE COMBINATORIAL BIDDING PROPOSED FOR PCS LICENSES IS INCONSISTENT WITH THE STATUTORY OBJECTIVES OF SECTION 309(j) AND SHOULD BE REJECTED.

The NPRM (§ 120) proposes that "combinatorial bidding," should be given "a significant test" in the licensing of broadband PCS. Specifically, the NPRM proposes to permit combinatorial bids for all of the MTA licenses in each of the 30 MHz spectrum blocks (Blocks A and B). Under this proposal, a single bidder could acquire all of individual licenses in a frequency block if the license fee it bids for the entire block exceeds the aggregate amount bid for all of the individual licenses in the block.

AT&T supports the right of any bidder to acquire all of the licenses necessary to operate on a nationwide basis. The question posed by the NPRM is whether combinatorial bidding can achieve that objective consistent with the objectives of Section 309(j).

Even though combinatorial bidding might assist in the efficient aggregation of licenses, it is inconsistent with the statutory objectives of competition and diverse ownership among licensees; rapid development and deployment of services, especially in rural areas; enhancing the public revenues to be derived from competitive bidding; and encouraging intensive use of the spectrum. Moreover, it would cause unnecessary inefficiency and complexity in the auction process. Therefore, the proposal should be rejected, and bidding on PCS spectrum Blocks A and B should be limited to auctions for individual MTA licenses.

First, contrary to the objective of Section 309(j)(3)(A), the proposed combinatorial bidding would likely cause significant delays in the introduction of PCS services in many parts of the country. Prompt development of a nationwide PCS network will require a tremendous expenditure of resources. The winner of a nationwide PCS combinatorial bid would likely concentrate its resources on developing services in only a fraction of the areas where it is licensed, leaving large areas underdeveloped for some time. On the other hand, bidders who win individual licenses will have strong economic incentives to devote their full efforts to intensive the development and marketing of PCS services throughout their smaller licensed territories.² In particular, the winner of a nationwide combinatorial PCS license is not as likely to develop its licenses in rural areas as quickly as bidders who win individual licenses. Even if the Commission requires bidders to fulfill the minimum build-out requirements in

² See Section 309(j)(3)(D), which provides that competitive bidding should promote "efficient and intensive use of the electromagnetic spectrum".

each MTA,³ a local or regional licensee is more likely to exceed those requirements than a nationwide combinatorial bidder.

Second, combinatorial bidding would not achieve the objectives of Section 309(j)(3)(B) to promote competition and diversity among licensees.⁴ Such bidding could discourage potential local or regional bidders from entering the bidding process, because they fear that a nationwide bidder would offer such a high overall price that they could not obtain the individual licenses they need for their planned operating areas. In addition, combinatorial bidders would be deterred from bidding for individual licenses, for fear of increasing the total fees paid for those licenses, and thereby reducing the chances that a combinatorial bid will succeed. Thus, combinatorial bidding could reduce competition in the bidding for the individual licenses, which could, in turn, drive down the market value of the spectrum.

³ If the Commission adopts any type of combinatorial bidding, it should require the combinatorial bid winner to meet all applicable build-out requirements for each individual license awarded. A combinatorial bid winner should be subject to significant forfeitures if it is subsequently disqualified from operating one or more of the licenses in the group or for failing to comply with such requirements.

⁴ See Section 309(j)(3)(B).

Combinatorial bidding could also substantially reduce the opportunities for diversity among licensees. Specifically, the two proposed nationwide auctions for PCS spectrum Blocks A and B could override the results of almost 100 individual auctions, resulting in a much smaller group of PCS license holders.

Third, contrary to the Commission's goals (§ 18) of simplicity and administrative efficiency, the proposed combinatorial bidding would add uncertainty, inefficiency and complexity to the bidding process. Under the Commission's proposed rules, tentative winners in the bidding for individual MTA licenses would not know whether they have actually been successful until all licenses in that frequency block have been auctioned and the sealed combinatorial bids have been opened. This could cause significant delays in the issuance of PCS licenses.

Moreover, combinatorial bidding would add layers of complexity to the bidding process. This would be particularly true if the Commission adopts its suggestion (§ 60) to require a third round of bidding for the Block A and B PCS licenses. If the Commission adopts the proposed combinatorial bidding process, a "final and best" round is necessary to provide a fair opportunity for both the individual and combinatorial bid winners. This additional round of bidding, however, could create even more administrative complexity and delay, while the individual

bid winners consult in preparation for their final bid against the combinatorial winner.⁵

In short, combinatorial bidding for PCS spectrum Blocks A and B does not appear to promote the goals of Congress or the Commission and should be rejected. Prospective nationwide PCS operators can acquire and aggregate all of the licenses they may need by participating in auctions for individual MTA licenses. The latter method will achieve all of the statutory objectives and will be less administratively cumbersome than combinatorial bidding.

II. BIDDING PROCEDURES

The Commission (§ 34) proposes to establish a competitive bidding system "that awards licenses to the eligible parties that value them the most within the guidelines set by Congress." This proposal is based upon the Commission's belief that, in the absence of market failures, the party that values a license the most would be most likely to make rapid and efficient use of the spectrum. AT&T strongly concurs in this assessment. AT&T also agrees with the Commission's conclusion that PCS licenses meet the statutory criteria for competitive bidding.

⁵ Adoption of the "final and best" bidding round may also encourage bidders to be more conservative in the initial rounds of bidding, because they know they will have to bid again.

Congress has directed the Commission both to begin issuing PCS licenses by May, 1994,⁶ and to monitor and report to Congress on the success of the competitive bidding process.⁷ Thus, the Commission must "hurry up" and get the process started, but also be sure that it "gets the job done right." The best way for the Commission to accomplish both directives is to begin the bidding process with narrowband PCS auctions and adjust its procedures as experience dictates.

AT&T generally agrees that the Commission should auction licenses in a manner that will encourage potential bidders to pay the highest market price, subject to their ability to fulfill their commitments to provide service to the public. After the Commission has gained the necessary experience from the introductory stages of the competitive bidding process, this would typically mean auctioning the largest spectrum licenses first, in order of population. This bidding sequence would allow licensees to establish the areas in which they will establish service "hubs" and enable them to determine which other licenses would be the most attractive to them.⁸

⁶ P.L. 103-66, § 6002(d)(2)(B).

⁷ Section 309(j)(12).

⁸ See NPRM, ¶ 125.

A. The Commission Should Begin Competitive Bidding with Auctions for Narrowband PCS Licenses in Order to Gain Necessary Experience.

The electromagnetic spectrum is a valuable and limited national resource. Decisions that affect uses of spectrum will play an important role in the development of the next phase of the telecommunications industry, and they could also have a substantial impact upon American competitiveness in the global economy. Therefore, the roll-out of competitive bidding should be carefully designed and should incorporate actual market experience obtained during the initial stages of the process.

AT&T suggests that the Commission fulfill its obligation to start competitive bidding in May, 1994 by conducting a trial that focuses on auctions for narrowband PCS licenses. This initial trial period would allow the Commission to test its proposed rules on auctions for smaller amounts of spectrum before final decisions are made about wideband spectrum auctions. During this period, the Commission could also experiment, if appropriate, with a number of different "upfront payment" formulae, deposit requirements and other auction procedures, as well as various financial preferences for designated entities.

After the initial narrowband license auctions, the Commission should then briefly apply its narrowband experience to a sampling of broadband PCS licenses, both MTA and BTA, in various urban and rural areas. During this

period, the Commission should also test auctions for other services subject to competitive bidding. After this phase, the Commission should be well prepared, and potential bidders well educated, to conduct the remaining auctions in a smooth, efficient and cost-effective manner.

B. Sequential Oral Auctions Will Best Serve the Statutory Objectives for All Spectrum License Applications.

AT&T agrees with the Commission's conclusion that applications for mutually exclusive PCS licenses are properly subject to competitive bidding. The NPRM correctly concludes (§ 116) that PCS spectrum, both broadband and narrowband, will principally be used to provide services to subscribers for compensation. The NPRM also correctly concludes (§ 117, fn. 114) that PCS license auctions will promote the statutory objective of rapid development and deployment substantially better than comparative hearings. In addition, auctions will promote efficient and intensive use of spectrum, because parties who pay competitively bid prices for their licenses will have the greatest economic incentives to put their investments to productive use. Furthermore, only competitive bidding will enable the public to recover a significant portion of the value of the spectrum.⁹

⁹ Section 309(j)(3)(C).

AT&T also agrees with the Commission's conclusions (§ 46) that oral ascending bidding should be the basic auction procedure for all competitive bidding under Section 309(j), and that it should be the "default" bidding mechanism whenever another bidding method is not explicitly specified. Oral auction procedures are well known and understood and would therefore simplify the competitive bidding process. Unlike sealed bidding, oral auctions also allow bidders to act upon the most currently available data in determining the amount they are willing to bid for particular licenses. In addition, oral auctions are generally perceived as fair, and they would enable parties to aggregate licenses easily and efficiently, even in the absence of any "combinatorial" bidding.

C. Sealed Bids Should Only Be Used in Limited Circumstances.

The Commission proposes (§ 49) to use sealed bids when it expects "very few bidders." The term "very few" should be narrowly defined to include only situations in which there are two or three bidders.¹⁰ Open oral bidding

¹⁰ In all cases, the identity of the bidders should be revealed, and at least the highest two bids should be disclosed at the auction. This allows other bidders and potential bidders an opportunity to understand the competition they may face in a particular market, and it also helps to establish market values for spectrum licenses.

allows bidders the greatest flexibility to respond to the immediate market conditions surrounding a particular auction and should be used in all but the most unusual circumstances. Moreover, even when there are relatively few bidders, the importance of any particular license may be critical to a specific bidder, e.g., a niche provider or a regional carrier seeking to fill out its service area. Oral bidding gives such bidders greater control over their own fate.

To the extent that the Commission uses sealed bids, AT&T agrees with the Commission's tentative conclusion (fn. 27) that bidders should only be allowed to submit one bid. AT&T also agrees with the proposal (§ 108) that sealed bids must be submitted five days before the scheduled opening. This period strikes an appropriate balance between the operational needs of bidders and the administrative requirements of the Commission.

An important related issue in this context is the appropriate definition of a "bidder." AT&T recommends that the Commission's rules define this term to mean either a single entity ("individual bidder") or a group of entities that combine together to bid in a specific auction ("consortium"). This definition encourages the formation of consortia, and will increase the number of parties able to participate in the bidding process. It also clarifies that

parties can freely participate in bidding teams, joint ventures or partnerships.¹¹

D. Other Bidding Procedures Should Be Used Sparingly Until the Competitive Bidding Process is Well Established.

Section 309(j)(3) requires the Commission to "test multiple alternative [bidding] methodologies under appropriate circumstances." In order to avoid confusion, however, the Commission should use caution in applying multiple bidding methods until after the competitive bidding process has become well established. Therefore, during the early stages of competitive bidding, the Commission should rely almost exclusively upon the well-known oral and sealed bidding methods.¹²

If the Commission wishes to develop experimental bidding processes, AT&T suggests that such experiments

¹¹ Another issue relating to the use of sealed bids is the procedures the Commission would follow if there are ties. AT&T recommends that in such cases the tied bidders should be permitted to submit additional sealed bids within 30 days, in order to give them sufficient time to develop their final bids and to make any additional financing arrangements they may need.

¹² AT&T agrees with the Commission's conclusion (§ 42) that the Dutch auction method should not be used under any circumstances. AT&T also recommends that only ordinary sealed bid auction procedures should be used. Second-bid sealed auction procedures are rarely used elsewhere, and they would introduce unnecessary confusion into the bidding process.

should focus on establishing a simultaneous bidding system for licenses in the same frequency block in multiple areas.¹³ The NPRM (§ 56) recognizes that this type of bidding would provide bidders with information on the value of licenses in multiple markets, and would likely result in an efficient allocation of bidders' resources. It would also facilitate the efficient aggregation of licenses without any need for combinatorial bidding.

**III. APPLICATIONS FOR "INTERMEDIATE LINKS" SHOULD NOT
ROUTINELY BE SUBJECT TO COMPETITIVE BIDDING.**

In Part II.B. of the NPRM, the Commission discusses the principles it proposes to use to determine whether applications for spectrum may be subject to competitive bidding pursuant to Section 309(j). AT&T generally agrees with the Commission's conclusions regarding the application of the criteria referenced in the statute. AT&T disagrees, however, with the Commission's conclusion that license applications for "intermediate links" should generally be subject to competitive bidding. In particular,

¹³ Simultaneous auctions could be conducted with or without electronic assistance. However, electronic auctions would require security procedures, e.g., development of security codes/passwords to assure that only qualified applicants participate in the auction. Security procedures are also required to assure that each bid can be verified as the actual bid of the indicated participant.

application of this requirement to point-to-point microwave and satellite services would not serve the public interest.

A. The Commission's Interpretation of the Mutual Exclusivity, Subscriber, Private Services and Principal Use Requirements is Correct.

1. The Mutual Exclusivity and Subscriber Requirements

Section 309(j)(1) only permits competitive bidding when there are mutually exclusive applications for spectrum licenses that have been accepted for filing.¹⁴ That Section also limits the use of competitive bidding to "initial" licenses or construction permits.¹⁵ Thus, the NPRM (§ 22) correctly concludes that auctions are not permitted in license modification or renewal proceedings.

Section 309(j)(2)(A) provides that competitive bidding can only be required when the anticipated use of the requested spectrum "will involve, or is reasonably likely to involve, the licensee receiving compensation from

¹⁴ The Commission is obligated, however, by Section 309(j)(6)(E) "to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity." See also, H.R. Rep. 103-213 ("Conference Report"), p. 485; H. R. Rep. 103-111 ("House Report"), p. 258. Thus, existing radio frequency coordination and other similar practices must be continued in order to avoid, where possible, the need for competitive bidding.

¹⁵ See also House Report, p. 253; Conference Report, p. 481.

subscribers." This requirement supports the NPRM's proposed exclusion (§ 23) of broadcast television and radio services.¹⁶

2. Private Services

AT&T agrees (see § 25) that the "private services" referenced in connection with Section 309(j),¹⁷ are not identical to the "private mobile services" defined in new Section 332(d)(3). These two terms are used to accomplish different statutory purposes.¹⁸ Moreover, as the NPRM notes (id.), these two terms are defined by overlapping, but not identical, criteria. Thus, the NPRM correctly proposes to exempt from competitive bidding spectrum license applications that principally involve internal uses by

¹⁶ See also, House Report, p. 253.

¹⁷ The term "private services" term does not appear directly in Section 309(j), but only in the legislative history. See Conference Report, p. 253 ("The enactment of Section 309(j) should not affect the manner in which the Commission issues licenses for virtually all private services.").

¹⁸ Section 332(d)(3) defines "private mobile services" as mobile services that are not "commercial mobile services". The statutory reason for this distinction is that Section 332(c)(2) exempts persons who offer private mobile services from being "treated as a common carrier for any purpose under th[e Communications] Act." On the other hand, when the term "private services" is used in connection with Section 309(j), it provides the basis for determining whether spectrum license applications may be awarded through the use of competitive bidding.

licensees (§ 26), Amateur Radio Service (§ 27), and other services without subscribers, particularly public service licensees.

On the other hand, Commercial Mobile Services, most common carrier fixed services, certain private mobile services established by Section 332, and certain other services regulated by the Private Radio Bureau are not private services under the language of Section 309(j)(2)(A), because they are typically provided to "subscribers" for "compensation." Therefore, the Commission is permitted to use competitive bidding for such services, provided that such bidding would promote the statutory objectives of Section 309(j)(3).

3. The "Principal Use" Requirement

Section 309(j)(2) provides that competitive bidding may only be required when the "principal use" of the requested spectrum will involve, or is likely to involve, the transmission or reception of communications signals to subscribers for compensation. The statute also directs the Commission to develop regulations for competitive bidding procedures by "class" of license or permit.¹⁹ In the NPRM (§ 31), the Commission proposes to determine whether specific classes of licenses may be subject to competitive

¹⁹ Section 309(j)(3).